

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 21, 2009

DAVID D. MOORE v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2006-B-1688 Cheryl Blackburn, Judge

No. M2008-01826-CCA-R3-PC - Filed November 24, 2009

Following an indictment by the Davidson County Grand Jury, Petitioner, David D. Moore, pled guilty to one count of conspiracy to deliver over twenty-six grams of cocaine. Petitioner filed a petition for post-conviction relief alleging ineffective assistance of counsel based upon counsel's failure to file an original motion to suppress and instead relying on the motion of a co-defendant. The post-conviction court summarily dismissed the petition for failing to state a colorable claim. When viewing the allegations in the petition in the light most favorable to Petitioner, we conclude that he has stated a colorable claim. Therefore, we reverse the post-conviction court's dismissal of the petition and remand so the post-conviction court can appoint counsel and conduct an evidentiary hearing.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Reversed and Remanded.

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

David Moore, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Victor S. Johnson, III, District Attorney General, and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

In April 2006, the Davidson County Grand Jury indicted Petitioner, and several co-defendants, for one count of conspiracy to deliver more than 300 grams of cocaine and one count of conspiracy to deliver over 300 pounds of marijuana. The co-defendants were also indicted for

several other counts. These indictments came as the result of a wiretapping investigation. Petitioner's trial counsel filed a motion to suppress the fruits of the electronic surveillance. The trial court held a hearing on the motion to suppress. Because many issues in Petitioner's case mirrored that of another co-defendant's case, trial counsel moved to incorporate the transcript from the other suppression hearing into evidence in Petitioner's suppression hearing. The trial court granted the motion. On July 5, 2005, the trial court denied Petitioner's motion to suppress.

On December 10, 2007, Petitioner entered a guilty plea to one count of conspiracy to deliver over twenty-six grams of cocaine. Pursuant to the guilty plea, he was sentenced to twelve years as a Range I, standard offender to run consecutively to a previous sentence, and the second count was dismissed.

On May 13, 2008, Petitioner filed a pro se petition for post-conviction relief. Petitioner argued that he was afforded ineffective assistance of counsel because "trial counsel[] fail[ed] to specifically and adequately suppress the fruits of the illegal wiretap as to him in particular" In his memorandum of law accompanying his petition, Petitioner sets out the following:

Petitioner Moore asserts that trial counsel's tactical decision to adopt [co-defendants-Darryl Moore['s]] motion to suppress and failure to raise the lack of showing of necessity under the Title III Federal wiretapping standards specifically in particular to his telephone number [948-5034] indicated in the original and extension wiretap applications and orders deprived him of a fundamentally fair hearing under the United States Constitution and United States Supreme Court precedent.

On June 18, 2008, the post-conviction court summarily dismissed the petition. The post-conviction court stated the following:

With his petition, Petitioner includes thorough briefing, arguing the legality of his wiretap interceptions. Thus, although Petitioner styles his claim as an ineffective assistance of counsel claim, his arguments are focused on wiretap requirements and his allegation that the wiretap interceptions authorized in his case were not lawful.

Claims directed towards pre-trial suppression issues are not cognizable post-conviction claims. Further, by accepting the plea agreement, Petitioner waived all issues regarding the legality of the wiretap interceptions and the evidence gained from them. The Court advised Petitioner during his plea colloquy that as part of his plea he was waiving his right to appeal. . . . The issue that Petitioner was waiving his rights is important because during the same hearing one of Petitioner's co-defendants entered a conditional plea where he reserved a certified question of law as to the authorization of the wiretap interceptions.

The post-conviction court dismissed the petition without prejudice based upon the conclusion that Petitioner did not set forth a cognizable claim. Petitioner filed a timely notice of appeal.

ANALYSIS

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or reevaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Shields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

The dismissal of the petition by the post-conviction court is an issue of law, therefore, this Court conducts a de novo review without a presumption of correctness. *See Burnett v. State*, 92 S.W.3d 403, 406 (Tenn. 2002) (citing *Fields v. State*, 40 S.W.3d 450, 457 (Tenn. 2001)).

Tennessee Code Annotated section 40-30-106 sets out the preliminary considerations for a post-conviction court upon receiving a petition for post-conviction relief. Tennessee Code Annotated section 40-30-106 states as follows:

(d) The petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings. Failure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition. If, however, the petition was filed pro se, the judge may enter an order stating that the petitioner must file an amended petition that complies with this section within fifteen (15) days or the petition will be dismissed.

(e) If a petition amended in accordance with subsection (d) is incomplete, the court shall determine whether the petitioner is indigent and in need of counsel. The court may appoint counsel and enter a preliminary order if necessary to secure the filing of a complete petition. Counsel may file an amended petition within thirty (30) days of appointment.

(f) Upon receipt of a petition in proper form, or upon receipt of an amended petition, the court shall examine the allegations of fact in the petition. If the facts alleged,

taken as true, fail to show that the petitioner is entitled to relief or fail to show that the claims for relief have not been waived or previously determined, the petition shall be dismissed. The order of dismissal shall set forth the court's conclusions of law.

T.C.A. § 40-30-106(d)-(f). A petition presents a “colorable claim,” when the claim “ ‘if taken as true, in the light most favorable to petitioner, would entitle petitioner to relief under the Post-Conviction Act.’” *Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004) (quoting Tenn. Sup. Ct. R. 28, § 2(H)). Tennessee Code Annotated section 40-30-103 states, “[r]elief under this part shall be granted when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.”

In *Swanson v. State*, 749 S.W.2d 731 (Tenn. 1988), our supreme court stated, “a pro se petition under the [Post-conviction] Act is ‘held to less stringent standards than formal pleadings drafted by lawyers, and the test is whether it appears beyond doubt that the [petitioner] can prove no set of facts in support of his claim which would entitle him to relief.’” 749 S.W.2d at 734 (quoting *Baxter v. Rose*, 523 S.W.2d 930, 939 (Tenn. 1975) (citation omitted)).

Both Petitioner’s petition for post-conviction relief and his brief on appeal are filed pro se. As stated above, a pro se petition is held to a less strict standard than one drafted by an attorney. *Id.* Petitioner’s inartfully drawn petition argues that his trial counsel was ineffective for failing to draft an original motion to suppress regarding the government’s wiretapping of Petitioner’s telephone and instead relied upon a motion submitted by a co-defendant. Presumably the motion to suppress with regard to the co-defendant would be fact-specific with regard to the allegations included in the wiretap applications with regard to the co-defendant and not necessarily Petitioner. Petitioner argues that he would not have pled guilty absent trial counsel’s failure to draft an original motion to suppress. We must view the inartfully drawn petition and arguments therein in a less stringent manner than those drafted by an attorney. Based in large part on the fact that the petition was filed pro se, we conclude that when Petitioner’s allegations are taken in a light most favorable to him, the allegations state a colorable claim for post-conviction relief.

Therefore, we remand this case to the post-conviction court to appoint counsel for Petitioner and hold an evidentiary hearing as required under the Post-conviction Act.

CONCLUSION

For the foregoing reasons, we reverse the decision of the post-conviction court and remand for further proceedings in accordance with this opinion.

JERRY L. SMITH, JUDGE